

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER: 01-0237  
SALES AND USE TAX  
For Years 1997, 1998, and 1999**

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**ISSUES**

**I. Sales/Use Tax—Best information available; failure to maintain adequate records**

**Authority:** IC 6-8.1-5-1(a); IC 6-8.1-5-4(a); IC 6-8.1-5-4(c) IC 6-8.1-5-1(b).

Taxpayer argues that the proposed assessment should be reduced because, in the taxpayer's opinion, the auditor's assessment, which was based on the best information available, was unreasonable.

**STATEMENT OF FACTS**

Taxpayer is a transient vendor registered to do business in Indiana. Taxpayer's activities involve the annual leasing of space at an annual festival, the use of which facilitates the taxpayer's sales of novelty items to festival attendees. With regard to its sales at the festival, taxpayer could provide no source documents to the auditor for examination. Rather, taxpayer kept manual records of sales in a notebook exclusively under the taxpayer's control.

Because the auditor did not feel that the taxpayer's handwritten notes were trustworthy, the audit proceeded on the basis of the best information available. In order to compute taxpayer's Indiana retail gross receipts, taxpayer's rental expense was multiplied by a factor of 10, a number that the auditor determined to be reasonable given the auditor's experience with festivals of a like nature.

Taxpayer claims that the auditor's factor is faulty for two reasons. First, it is a figure determined by the auditor's own experience. Taxpayer suggests that a figure derived from its federal income tax forms, which disclose the relationship between taxpayer's overall rental expense and overall gross income, would be more appropriate. Second, taxpayer contends that Indiana rental expense is not accurate because taxpayer sublets some of its space to other vendors. This subletting would necessarily cause a lessening in the taxpayer's available space for making sales. Taxpayer argues that, regardless of the factor used, the factor should be multiplied against the amount of rental expense incurred for the taxpayer's own benefit, and not that which taxpayer subsequently sublet away.

## **DISCUSSION**

If the department reasonably believes that a person has not reported the proper amount of tax due, the department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the department. IC 6-8.1-5-1(a). Every person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. IC 6-8.1-5-4 (a). A person must allow inspection of the books and records and returns by the department or its authorized agents at all reasonable times. IC 6-8.1-5-4 (c). The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. IC 6-8.1-5-1(b).

Taxpayer has supplied the Department with his own hand-written records of sales during the festival. However, these records are suspect, as they are self-serving, subject to tampering and human error, and no evidence exists that these records were kept during the festival itself and were not made in anticipation of the audit. As a result, the auditor's reliance on extrinsic evidence is warranted in this situation.

However, the taxpayer has provided sufficient evidence to contradict the auditor's assumption that taxpayer's gross revenue is a multiple of 10 of its rental expense. Taxpayer's proposed reliance on federal income tax forms is justified as a valid foundation for a determination using the best information available and establishes the multiple as  $7 \frac{2}{3}$ .

Taxpayer has failed, however, to prove that the rental expense in Indiana is anything other than what is shown on the contract between taxpayer and the festival's organizers. Aside from a list of supposed sublessors supplied by taxpayer himself, no evidence exists that any formal subletting took place. The contract itself specifies that subletting is not allowed. There is no evidence of any contractual terms between taxpayer and his alleged sublessors. None of the alleged sublessors are registered as retail merchants with the Department, and the people working the booths that were leased by taxpayer all stated that they were taxpayer's employees.

## **FINDINGS**

The taxpayer is sustained to the extent that the gross revenue multiple is adjusted to  $7 \frac{2}{3}$  and denied as to the remainder of the protest.